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## CITATIONS

In The

# Supreme Court of the United States

October Term, 1963

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## No. 69

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LEVIN NOCK DAVIS, SECRETARY, STATE BOARD OF ELECTIONS, ET AL.,

*Appellants,*

v.

HARRISON MANN, ET AL.,

*Appellees.*

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Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria

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**BRIEF ON BEHALF OF INTERVENING APPELLEES**

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## I. THE QUESTIONS PRESENTED

In view of the admission of appellants that the Three Judge Federal Court had jurisdiction to hear this cause pursuant to *The Civil Rights Act*, Title 42, United States Code, Sections 1983, 1988, et seq., the questions presented are as follows:

(1) Where a Three Judge Federal Court has found that as a matter of law and fact a state has malapportioned legislative representation so as to effect invidious discrimination in violation of the 14th Amendment To The Constitution Of The United States with respect to residents of certain political

subdivisions within said state, should the Federal Court have to abstain from granting relief until a State Court is given an opportunity to do so?

(2) Where the value of the vote of a resident of one particular locality is diluted one-half or more than that of a resident of another political subdivision, without rational basis, have the residents of the devalued locality been deprived of the equal protection of the laws in contravention of the 14th Amendment to The Constitution Of The United States?

## II. STATEMENT OF THE CASE

In view of the statement on page 4 of the appellant's brief that "the only evidence introduced by the appellees in the court below, which might be considered material, dealt with population figures", a completely independent statement of the case is here set forth:

### A. Intervening Petitioners

Intervening petitioners are citizens and qualified voters of the City of Norfolk, Virginia, who filed as intervenors in the principal suit herein to have declared unconstitutional state legislative apportionment statutes passed by the Virginia General Assembly in its 1962 session.[1]

### B. Background Of The Case

Section 43 of the Constitution of Virginia, Code of Virginia of 1950, Volume 9, Page 458, requires

[1] The 40 seats in the Senate of Virginia were allocated to localities by Chapters 635 of the Acts of Assembly of 1962, Section 24-14, as amended by the Code of Virginia of 1950; the 100 seats in the House of Delegates were allocated to localities by Chapter 638 of the Acts of Assembly, Section 24-12, as amended, of the Code of Virginia of 1950.

the Senate and House of Delegates of the General Assembly of Virginia to be reapportioned following the decennial taking of the national census, which officially fixes the population of the State of Virginia. The Constitution contains no criteria for reapportionment and leaves the mechanics of allocating representation entirely to the discretion of the legislature.

The first reapportionment required by the Constitution after World War II was to have taken place at the regular session of the legislature, which convened in January 1952. At this session a study commission consisting of legislators appointed by the Governor recommended that Norfolk, together with other growing sections of the state, be awarded additional representation and the controlling factor in allocating Norfolk additional representation was the increase in its total population, including military personnel.[2]

The legislature refused to follow the committee's recommendations and adjourned without any reallocation of representation and Governor John Battle convened a special session of the legislature for the purpose of reapportioning the state, and House and Senate bills were passed in four days granting Norfolk an additional delegate based upon

[2] In 1950 the Virginia Commission on Redistricting had as a member, now Governor, Albertis S. Harrison, who was then a state Senator. Recommendation No. 56 of the Official Report to the State Legislature reads as follows: "An additional delegate should be given to give Norfolk City six for a population of 213,513."

total population, including military personnel.[3]

In 1960 in anticipation of the Constitutional mandate to reapportion in 1962, Norfolk's state Senators, among others, introduced a resolution for a study commission composed solely of state legislators to prepare a plan of reapportionment during the two-year interim adjournment of the Assembly. The resolution failed to pass and the General Assembly adjourned without making any preparation for the reapportionment responsibility of 1962. This legislative abrogation of responsibility required Governor J. Lindsay Almond to appoint a reapportionment study committee consisting of legislators and leading citizens from representative areas throughout the state. This committee held hearings throughout the state and commissioned the Bureau of Public Administration of the University of Virginia to study and make recommendations to the committee as to a fair and equitable plan for reapportioning representation. The Bureau of Public Administration made a report on the problems of reapportionment and redistricting, (Exhibit P. 2, R. 89) a Plan A and B for reapportioning the House of Delegates (Exhibit P. 3, 5, R. 101, R. 119) and a Plan A, B and C for reapportioning the Senate. (Exhibit P. 7, P. 8, P. 10, R. 126, R. 140 and R. 151) The committee studied these plans and then submitted to the Governor a plan of its own. (Exhibit P. 12, R. 159, known as the "Hoover Report").

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[3] **Virginia General Assembly House Journal For Special Session, 1952:**
Session convened December 2, 1952; House Bill for reapportioning House passed 89-3 on December 5, 1952; amended by Senate and passed 35-4 on December 6, 1952; Senate amendment approved by House of Delegates on December 6, 1952, 93-0; Senate Bill for reapportioning Senate passed Senate December 5, 1952, 34-6; Senate Bill approved by House December 6, 1952, 91-4; Governor signed into Law December 15, 1952.

House Plans A and B and the Hoover Report awarded Norfolk a seventh Delegate and Senate Plans A, B and C and the Hoover Report awarded Norfolk a third Senator.

The 1962 session of the Virginia General Assembly convened January 10, 1962. On February 19, the Senate Privileges And Elections Committee appointed a sub-committee to consider the question of reapportionment. The sub-committee held no public hearings, and kept no minutes, but reported to the full committee in executive session eight days later, rejecting substantially all of the recommendations of the Hoover Commission and allowing no increase in representation for the City of Norfolk, even though Norfolk's population had substantially increased.[4]

The Senate passed the bill on March 1, 1962. The House Of Delegates, acting similarly, appointed a

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[4] Although Norfolk's population in the ten years between 1950 and 1960 had increased 91,356, its representation in the Virginia General Assembly was not altered and remained the same. Norfolk's two senators now represent 152,435 citizens each, and its index of representation is .65, the ideal factor being 1.0. On the other hand, the adjacent governmental units of Norfolk County and South Norfolk, now Chesapeake City, have one Senator who represents only 73,647 citizens, and their representation index in the Senate is 1.35. This unit lost 36,724 citizens between 1950 and 1960.

Plaintiff's Exhibits established that the value of the vote of citizens of 33 political sub-divisions exceeded the value of the vote of a citizen of Norfolk from 90% to 147%. The favored political sub-divisions were: The counties of Albemarle, Amelia, Amherst, Appomattox, Botetourt, Brunswick, Buckingham, Charlotte, Clarke, Culpepper, Cumberland, Dickenson, Dinwiddie, Fauquier, Fluvanna, Frederick, Giles, Goochland, Greene, Greensville, Halifax, Loudoun, Louisa, Lunenburg, Madison, Mecklenburg, Nelson, Norfolk, Nottaway, Orange, Powhatan, Prince Edward, Prince George, Prince William, Pulaski, Shenandoah, Spotsylvania, Surry, Tazewell, Wise, Wythe; and the cities of Charlottesville, Fredericksburg, Hopewell, Norton, Petersburg, South Boston, South Norfolk and Winchester.

sub-committee on February 20, to consider the recommendations of the Hoover Commission. This committee on February 27, reported a plan of token apportionment that, likewise, deprived Norfolk of the additional representation in the House that was recommended by the Hoover Commission and by House Plans A and B of the Bureau of Public Administration of the University of Virginia. The subcommittee's bill was voted out of the House Privileges And Elections Committee on February 27 and passed the House on March 2. This action by the General Assembly presented Norfolk with a plan of reapportionment that allowed an additional Delegate to the adjacent City of Virginia Beach, where population had increased, but denied additional House and Senate representation to Norfolk, where population had increased by Forty (40%) Per Cent, and permitted the adjacent City of Chesapeake to retain a seat of its own in the Senate, notwithstanding substantial diminution in population. The index value of the vote in the City of Chesapeake for the State Senate is One Hundred Thirty-Five (135%) Per Cent and for the City of Norfolk Sixty-Five (65%) Per Cent. (R.234,235)

The principal suit to invalidate this reapportionment was filed April 9, 1962, and the intervening petition on behalf of Norfolk was filed May 25, 1962. The Court ordered pre-trial briefs to be filed and a brief on behalf of intervening petitioners, addressed to the merits of the case, was filed on July 20, 1962, and on September 20, the Attorney General filed a reply brief limited solely to the doctrine of abstention and reasons for dismissing the suit. The case was heard by the Three Judge Court on October 22-23, 1962, and during the trial the office of the Attorney General failed to produce a single witness,

or legislator to prove the rationale of the apportionment statutes under attack.

Petitioners and intervening petitioners offered Seventeen (17) Exhibits and the deposition of Dr. Ralph Eisenberg, who headed the study made for the Hoover Commission on Reapportionment. (R. ii,iii) Dr. Eisenberg, an authority on the subject, testified without contradiction that the disparity in the value of the vote for the state Senate between the citizens of Norfolk and the adjacent community of Chesapeake exceeded the maximum tolerance consistent with fair apportionment. (R.235)

On November 28, 1962, Circuit Judge Albert V. Bryan handed down the majority opinion of the Three Judge Court, declaring the subject statutes unconstitutional and entered a decree enjoining elections pursuant to the unconstitutional acts and afforded the Virginia General Assembly until January 31, 1963, to meet and reconsider a fair and equitable reapportionment. This Court subsequently stayed this decree.

C. What The Instant Case Decided

The majority opinion below held that Virginia does not follow the Federal Legislative System, as do other states and, therefore, in Virginia there is no difference in status between Senators and Delegates and the applicability of the Federal analogy to the state legislative bodies was not involved in this case, as it was in *Scholle v. Hare*, (1962) 369 U.S. 429, 82 S. Ct. 910.

The Court found a wide disparity in the value of the vote of the citizens of Norfolk and other areas of the state, without basis in fact or reason. The Court held that a wide disparity in the value of an individual's vote from section to section within a

state without rational basis constituted invidious discrimination.[5]

## III. SUMMARY OF THE ARGUMENT

### A. In Cases Arising Under The Federal Civil Rights Act The Federal Courts Will Not Abstain Where There Is No Substantial Underlying Question Of State Law That Is Peculiarly Susceptible To State Court Interpretation.

*McNeese v. Board of Education* (1963) 371 U.S. 933, 83 S. Ct. 1433, clearly holds that Federal Courts will grant relief to persons claiming under the Civil Rights Act to have been aggrieved by deprivation of federal human rights where no controlling underlying issue of state law requires interpretation.

Therefore, cases such as *Railroad Comm. of Texas v. Pullman Co.*, (1941) 312 U.S. 496, 61 S. Ct. 643, where the interpretation of a Texas statute could have been determinative of the case, or *Thompson v. Magnolia Petroleum Co.*, (1940) 309 U.S. 478, 60 S. Ct. 628, where unsettled questions of state property law would largely determine the legal rights of the parties, or *Harrison v. N.A.A.C.P.*, (1959) 360 U.S. 167, 79

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[5] **Lower Court Opinion (R. 67):**

"Indulging all of the reasonable inferences which may be fairly drawn from the redistricting, we can find no rational basis for the disfavoring of Arlington, Fairfax, and Norfolk. No acceptable formula, plan or design is shown us to account for the disparate divisions of the State. We do not mean to establish an allowable tolerance of divergence from the ideal district — whether more or less than a specified per centum. Nor do we intend to say that there cannot be wide differences of population in districts if a sound reason can be advanced for the discrepancies. We merely say none is offered here."

S. Ct. 1025, where "lengthy, detailed and sweeping" Virginia statutes were "fairly open to interpretation," or *Pennsylvania v. Williams*, (1935) 294 U.S. 176, 55 S. Ct. 380, where the private interests would suffer no harm in allowing a duly appointed state officer to perform his duty pursuant to state insolvency laws as he had requested are not applicable.

In each case cited by the appellants there has been a similar consideration which led the Court to abstain.

At page 24 of appellants' brief, it is conceded that Sections 24-12 and 24-14 of the Code of Virginia require no interpretation. Section 43 of the Constitution is as free of ambiguity as are the statutes.

It is apparent on the record in this case that a determination of the 14th Amendment's meaning is absolutely necessary for the determination of this case.

A decision on the merits of this case will not result in a "needless friction with state policies".

This Court has decided in *Baker v. Carr*, (1962) 369 U.S. 186, 82 S. Ct. 691; *W. M. C. A., Inc. v. Simon*, (1962) 370 U.S. 190, 82 S. Ct. 1234; *McNeese v. Board of Education*, (1963) 371 U.S. 933, 83 S. Ct. 1433, and *Lane v. Wilson*, (1939) 307 U.S. 268, 59 S. Ct. 872, that federal courts will exercise their jurisdiction in cases such as this.

B. The Dilution Of The Value Of Petitioners' Vote Without Reason Constitutes Invidious Discrimination

The Lower Court's finding of fact that the legislative representation disfavoring Arlington, Fairfax and Norfolk was without rational basis is

supported by the record and dictates its conclusion that unconstitutional invidious discrimination had been proved. (R. 67)

Intervenors proved that an unbiased Commission, consisting of legislators and citizens appointed by the Governor of Virginia, had recommended that Norfolk, with a population of 304,869, should be allocated three Senators and seven Delegates in the state legislature. A similar recommendation was made by the Bureau Of Public Administration of the University Of Virginia.

With a state population of 3,966,949, ideally, one Senator would represent 99,174 persons and one Delegate 39,669 persons. (R. 61,63)

By reason of a 91,356 increase in population since 1950, a Norfolk Senator represents 152,435 people and in the adjacent City of Chesapeake, a Senator represents only 73,647 persons and in the district composed of the Town of Culpepper and the Counties of Fauquier and Loudoun, only 63,703. There are eleven districts that are nearly One Hundred (100%) Per Cent richer in each vote's worth than Norfolk. (R.61)

A Norfolk Delegate represents 50,812 persons, while a Delegate from Shenandoah represents only 21,825 persons. Like disparities exist in other districts.

Appellants contention that military related population should not be considered in an effort to reduce disparities is untenable. The Virginia legislature has historically employed population as enumerated by the decennial United States census as a decisive factor in legislative reapportionment. As a matter of fact, the last reapportionment effected by a Special Session of the General Assembly in 1952 award-

ed Norfolk an additional delegate based upon the 1950 census count of 213,513 persons, including military related population, which represented an increase of 69,181 over the 1940 census.

Norfolk has now been denied additional representation notwithstanding a 1960 census increase of 91,356 to a total population of 304,869.

Finally, appellants attempt to justify the effect of Virginia's intrasectional disparities in representation by comparing the degree to that existing in other states fails, for the measurement of the effect of discrimination must be limited to the area in which it is practiced.

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## IV. ARGUMENT

### A. The Federal Civil Rights Act Required The Lower Court To Exercise Jurisdiction

This suit was brought alleging a violation of the Federal Civil Rights Act, 42 United States Code, Sections 1983 and 1988, and jurisdiction in the District Court was founded upon 28 United States Code, Section 1343.

This Court recently held that a school desegregation suit out of Illinois was properly decided upon its merits by the Federal Courts, notwithstanding the fact that the Illinois Constitution prohibited the conduct complained of and provided a statutory remedy.

In *McNeese v. Board of Education* (1963), 371 U.S. 933, 83 S. Ct. 1433, Mr. Justice Douglas, speaking for eight members of the Court, said at page 1435 of 83 S. Ct.:

"We have previously indicated that relief under the Civil Rights Act may not be defeated because relief was not first sought under state law *which provided a remedy*. We stated in Monroe v. Pape, 365 U.S. 167, 183, 81 S. Ct. 473, 482, 5 L. Ed. 2d 492:

> 'It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.'
>
> "* * *
>
> "* * * The purposes (of the Civil Rights Act) were several fold — to override certain kinds of state laws, to provide a remedy where state law was inadequate, 'to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice' * * * and to provide a remedy in the federal courts supplementary to any remedy any State might have * * *.
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> "We would defeat those purposes if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court. * * *"
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> "* * *
>
> "* * * It is immaterial whether respondent's conduct is legal or illegal as a matter of state law. * * * Such claims are entitled to be adjudicated in the federal courts. (Citing cases)". (Italics Supplied)

In *Browder v. Gayle*, (M.D. Ala. N.D., 1956) 142 F. Supp. 707, (affirmed per curiam, 352 U.S. 903, 77 S. Ct. 145) the validity of Alabama State laws and Montgomery city ordinances were in issue. Injunctive relief was prayed for. The defendants there urged abstention for reasons of comity, until the

State Courts could construe the validity of the contested statutes and ordinances. The District Court, speaking through Circuit Judge Rives, said at page 713:

> *"The short answer is that doctrine has no application where the plaintiffs complain that they are being deprived of constitutional civil rights,* for the protection of which the Federal courts have a responsibility as heavy as that which rests on the State courts." (Italics Supplied)

*Lane v. Wilson,* (1939) 307 U.S. 268, 59 S. Ct. 872, is closely analogous to our case. In *Lane,* a colored Oklahoma resident brought suit under the Civil Rights Act, R. S. Section 1979, (now 42 United States Code Section 1983) for money damages alleged to have been sustained by reason of racial discrimination in violation of the Fifteenth Amendment. Said Mr. Justice Frankfurter for the Court at page 274 of 307 U.S.:

> "* * * The basis of this action is inequality of treatment though under color of law, not denial of the right to vote."

In essence, that is the claim of the appellees here, although here the Fourteenth Amendment is involved.

Mr. Justice Frankfurter further continued with respect to the contention that the state courts should have the first opportunity to construe the portions of the Oklahoma laws complained of:

> "* * * Barring only exceptional circumstances, * * * or explicit statutory requirements * * * resort to a federal court may be had without first exhausting the judicial remedies of state courts. Bacon v. Rutland, 232 U.S. 134; Pacific Tel. & Tel. Co. v. Kuykendall, 265 U. S. 196."

Therefore, held the Court, finding no such circumstances or statutes to be present:

> "We cannot avoid passing on the merits of plaintiff's constitutional claim."

There are no more "exceptional circumstances" or "explicit statutory requirements" existing in the case at bar than were present in *Lane*. There is no more need for abstention here than there was in *Lane*. There is as much necessity for adjudicating the constitutional question here as there was in *Lane*. *Lane* is a compelling precedent in this case. *Doud v. Hodge*, (1956) 350 U.S. 485, 76 S. Ct. 491; *Hague v. C. I. O.*, (1939) 307 U.S. 469, 59 S. Ct. 954; and *Gray v. Sanders*, (1963) 372 U.S. 368, 83 S. Ct. 801.

Abstention is not an automatic procedure even in cases involving the construction of state statutes. *N.A.A.C.P. v. Bennett*, (1959) 360 U.S. 471, 79 S. Ct. 1192.

The right alleged here is just as plainly federal "in origin and nature" as were those claimed in *Brown v. Board of Education*, (1954) 347 U.S. 483, 74 S. Ct. 686, and *McNeese v. Board of Education*, (1963) 371 U.S. 933, 83 S. Ct. 1433, where federal jurisdiction was accepted and exercised despite state statutes and constitutions lurking in the background.

These decisions and the reasons underlying them are implicit in the opinion of this Court in *W.M.C.A., Inc. v. Simon*, (1962) 370 U.S. 190, 82 S. Ct. 1234, where the court remanded the case to the District Court for a consideration on its merits.

A statement by Judge Murrah in *Stapleton v. Mitchell*, (D. C. D. Kansas, 1945) 60 F. Supp. 51, 55 (Appeal dismissed, 326 U.S. 690) which was quoted with approval in *McNeese*, (1963) 371 U.S. 933, 83 S. Ct. 1433, footnote 6, states the appellee's views:

"We yet like to believe that wherever the federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum."

At the least, cases arising in the Federal Courts under the Civil Rights Act, in light of the foregoing decisions, are to be decided on the merits, if no substantial and controlling state statute requires State Court interpretation first.

On the broadest reading of these cases it is immaterial as to whether or not there is a state statute to be construed, because there is a point at which comity must yield to uniform interpretation of the Federal Constitution.

One thing is apparent from a review of these authorities. Cases applying the doctrine of abstention, where the claim for relief is founded on some statute other than the Civil Rights Act are inapplicable to the facts in the instant case. Stated otherwise, the Federal Courts have been extremely reluctant to invoke the doctrine of abstention in Civil Rights Act cases.

It follows that the District Court, in accordance with existing law, properly decided this case on the merits. The Supreme Court should do likewise.

B. Dilution Of The Value Of The Vote Of Intervening Petitioners, Without Rational Basis, Deprives Them Of Equal Protection Of The Law In Contravention Of The Equal Protection Clause Of The Fourteenth Amendment To The Constitution Of The United States

The principal point involved in this appeal is whether certain citizens of Virginia, including those of Norfolk, have been the object of invidious discrimination in the apportionment of representation in the state legislature.

The Three Judge Federal Court below found as a matter of fact that they had been, on the basis that there was no rational basis for the disfavoring of Arlington, Fairfax and Norfolk (R. 67) and that such discrimination constituted invidious discrimination prohibited by the Equal Protection Clause of the Fourteenth Amendment.

The token reapportionment passed by the 1962 Legislature is a crazy-quilt without rational basis.

The evidence established that the value of the vote of citizens of 33 political sub-divisions exceeded the value of the vote of a citizen of Norfolk from ninety per cent (90%) to one hundred forty seven per cent (147%). See footnote 4.

A citizen of Arlington, Fairfax and Norfolk is provided representation or voting power in the Senate of less than half that possessed by a citizen of any of six of the other thirty-three remaining districts in the state. (R. 61) In the House, a vote of Fairfax has less than one-fourth of the voting force in four other districts. (R. 63)

The Commonwealth contends that military related citizens should not be counted in Norfolk, but should be counted in the adjacent City of Virginia Beach, which was allocated an additional delegate based upon total population, including the military.

The present plan also contains horizontal discrimination that embroiders this "crazy-quilt" of

reapportionment, for the plan discriminates against rural areas without reason.[6] Appellants can suggest only two theories to justify the existing plan, namely, there is not as great a degree of voter discrimination as in some other states and the disparity in the value of the vote in Norfolk and Northern Virginia could possibly be explained if the military related citizens were not considered.

### 1. The Measure Of Discrimination Is Limited To The Area In Which The Discrimination Is Practiced

Appellants concede that there is a population disparity of better than two to one, in both the House and Senate without reference to whether or not you count military related population. Appellants attempt to justify this sectional discrimination by pointing to greater disparities existing in

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[6] Following the 1950 census, Russell County in southwest Virginia, had a population of 26,818 and was allocated one delegate. The County of Shenandoah, with 21,169 citizens, was allocated one delegate and Southampton County, with a population of 26,522 was allocated one delegate. All three counties are primarily rural and consist of one governmental sub-division.

As a result of the 1960 census, Russell County had 26,290 citizens; Shenandoah 21,825, and Southampton had 27,195. From a reapportionment standpoint these populations would be considered stable. However, when the Virginia General Assembly took three delegates away from the independent minded mountain folk of southwest Virginia, they deprived Russell County of its delegate and combined it with Dickenson County with a population of 20,211 people, making a total of 46,501 people in a mountainous territory to be represented by one delegate, and reduced the index value of the vote of those citizens to .85. On the other hand there was no dilution of the vote in Shenandoah County or in Southampton County.

The land area of Shenandoah and Russell Counties are substantially the same, Russell County having 483 square miles and Shenandoah 507 square miles. (See Virginia General Assembly Register (1940-1960).)

other states. This is not the test of discrimination. Appellants would argue as a defense to a discrimination suit brought by a Negro citizen of Virginia, that there was more discrimination in Alabama. Discrimination with respect to the citizen of Virginia must be measured by what is being done to him in Virginia and not in some other state. This principle is peculiarly applicable to what constitutes apportionment discrimination in Virginia.

Virginia's founding fathers were dedicated to a republican form of government and its citizens have been bred to expect the same and have sought it through the years, notwithstanding the congenital reluctance of political office-holders to conform to the essential of a republican form of government, i.e., equal representation.

The problem of conforming the politician's appetite for control to the principles of a republican form of government is stated in a letter written by Thomas Jefferson, June 12, 1816, as it appears on page 475 of the *Debates Of The 1829-30 Constitutional Convention Of Virginia:*

> "The question you propose on equal representation, has become a party one, in which I wish to take no public share. Yet if it be asked for your own satisfaction only, and not to be quoted before the public, I have no motive to withhold it, and the less from you, as it coincides with your own. At the birth of our Republic I committed that opinion to the world, in the draught of a Constitution annexed to the Notes on Virginia, in which a provision was made for a representation permanently equal. The infancy of the subject at that moment, and our inexperience of self-government occasioned gross departures in that draught from genuine republican canons. In truth, the abuses of monarchy had so much filled all the space of political contemplation, that we imagined every thing

republican that was not monarchy. *We had not yet penetrated into the mother principle, that "Governments are republican only as they embody the will of their people and execute it."* Hence, our first Constitutions had, really no principle in them. But experience and reflection have more and more confirmed me in the particular importance of the representation then proposed. On that point, then, I am entirely in sentiment with your letters, &c.

"'But inequality of representation in both Houses of our Legislature is not the only republican heresy in this first essay of our revolunitary patriots, at forming a Constitution. For, let it be agreed that Government is republican in proportion as every member composing it has his equal voice in the direction of its concerns (not indeed in person, which would be impracticable beyond the limites of a city or small township, but) by representatives chosen by himself and responsible to him at short periods; and let us bring to the test of this canon every branch of our Constitution.

"'In the Legislature, the House of Representatives is chosen by less than half the people, and not at all in proportion to those who do choose. The Senate are still more disproportionate, and for long terms of responsibility. In the Executive, *the Governor is entirely independent of the choice of the people and of their control; his Council equally so, and at best but a fifth wheel to a waggon.*'

"'Again, "But it will be said, that it is easier to find faults than to amend. I do not think their amendment so difficult as is pretended. Only lay down true principles and adhere to them inflexibly. Do not be frightened into their surrender by the alarms of the timid, or the croakings of wealth against the ascendancy of the people. If experience be called for, appeal to that of our fifteen or twenty Governments for forty years, and shew me where the people

have done half the mischief in these forty years, that a single despot would have done in a single year, or half the riots and rebellions, the crimes and the punishments, which have taken place in any single nation under Kingly Government during the same period. The true foundation of republican government is the equal rights of every citizen in his person and property, and in their management. Try by this, as a tally, every provision in our Constitution and see if it hangs directly on the will of the people. Reduce your Legislature to a convenient number, for full, but orderly discussion. *Let every man who fights or pays exercise his just and equal right in their election.* Let the Executive be chosen in the same way, and for the same term, by those whose agent he is to be, and have *no screen of a Council,* behind which to skulk from responsibility." (Italics Supplied)

Every modern day Constitution of Virginia has required that there be a reapportionment of the state legislature following the taking of the decennial census of the United States and the current Governor of Virginia has admitted that historically population has been utilized as the principal factor in redistricting Virginia (R. 65)

As a matter of history, Section 6 of the Constitution Of Virginia of 1864 placed particular emphasis on the enumeration of the inhabitants of the state [7] as the principal criterion for reapportioning legislative representation.

The Constitutional Convention of 1902 was the

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[7] **Constitution of 1864, Section 6:**

It shall be the duty of the general assembly, in the year one thousand eight hundred and seventy, and in every tenth year thereafter, to reapportion representation in the senate and house of delegates among the cities of Norfolk and Richmond and the several counties, from an enumeration of the inhabitants of the state.

first to attempt to deal with what was then deemed to be the problem of the newly emancipated Negro citizen and the words "from an enumeration of the inhabitants of the state" were removed from the constitutional mandate, but the necessity for reallocating representation following the census was maintained.

The Senate of Virginia emphasized the continuing importance attached to numbers in considering representation questions when it passed Senate Joint Resolution No. 13 in 1962, memorializing Congress to provide for the election of the President and Vice-President of the United States by Congressional Districts rather than through the medium of the Electoral College. The resolution provided, in part, as follows:

> "Whereas, such method gives undue weight, in states where the political parties are almost equal in strength to minority groups which can deliver only a small number of votes but may be able to control the entire electoral vote of the state, thereby exercising an influence disproportionate to their numbers;"

Appellants in their brief boast that the General Assembly of Virginia has "faithfully" followed the mandate to reapportion found in Section 43 of the Constitution of 1902 (Appellants' Brief, 10). The fact is that a relatively stable population prior to World War II tolerated token reapportionment and when the Assembly was presented with its first substantial population growth to be dealt with following the taking of the 1950 census it refused to effect any degree of reapportionment. The debates and proceedings of the Virginia legislature are not reported and one must resort to newspaper accounts

of the proceedings.* Public opinion was marshalled

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* **The Richmond News Leader, Thursday, March 27, 1952**

"What is it worth to Virginians to uphold the principle of republican government? What price tag can be placed on fulfillment of an oath to support the State Constitution?

"Those are questions that might well be pondered by members of the General Assembly in deciding whether to reconvene in an extra session some time before the end of 1952. The short answer, it seems to us, is that principle and honor are without price, and precisely these intangibles — nothing more and nothing less — are at stake in the issue of redistricting the General Assembly. Delegate Armistead Boothe, of Alexandria, merits public thanks for pressing the issue.

"Nothing could be plainer than the inequities in representation that now exist in Virginia's Legislature. Rural areas are far over-represented; urban areas — notably Norfolk-Portsmouth and Arlington-Alexandria — are far under-represented. One voter in Halifax County carries more than twice the weight of a voter in urban Fairfax."

**The Richmond Times-Dispatch, Saturday, March 29, 1952**

"Section 43 of the State Constitution provides that 'a reapportionment shall be made in the year 1932 and every 10 years thereafter'. By design, or otherwise, this provision as to districts in the State Legislature is less specific than Section 55, which provides, with respect to congressional districts, that they 'shall be composed of contiguous and compact territory containing as nearly as practicable, an equal number of inhabitants.'

"Various Virginia Legislatures have taken advantage of the unspecific language of Section 43 to evade its moral implications by reshuffling a couple of districts and calling that a 're-apportionment'. Such by-passing of the requirement does not carry out the intent of the section, whatever the legal hair-splitters may say.

"The General Assembly of 1952 should have attended to this matter at its regular session, in accordance with the Constitution's intent. Instead, after an abysmally inadequate discussion, the Senate passed a phony bill, making inconsequential changes in only three out of 115 districts. This bill was killed in the House, at the very end of the session. Hence, the only thing left was a special session later in the year, or action at the regular session of 1954.

"It would carry out the intent of the Constitution and correct immediately the glaring inequities in the population of many districts. These inequalities are so tremendous

and the Governor called a special session and the areas with an increase in population were given additional representation in 1952.

The citizens of Norfolk, having through the years received that to which they were entitled, naturally feel deeply the result of each area adjacent to it being favored by the token reapportionment plan of 1962 and their being discriminated against. The effect of such discrimination on the people of Norfolk cannot be eased by telling them that the residents of New York City, Alabama, Georgia or Florida are discriminated against even more. Courts have defined the word "invidious" by adopting the definition in Webster's International Dictionary:

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(Footnote 8 Continued)

that the task of making necessary adjustments must not be dodged. It is the lawmaking body's special responsibility to see that these inequalities are corrected in the year 1952, as called for by the fundamental law of the Commonwealth."

**The Norfolk Virginian Pilot, Sunday, March 30, 1952**

"A, Virginia Scandal That Demands Undoing

"The Washington scandals and the national presidential campaign should not cause Virginians to forget for one moment that one of the crudest political decisions of the year was made right in Richmond by the Virginia General Assembly. This was the decision not to redivide the Legislature's seats despite the great changes in population in the past decade.

"Hair-splitters may find some weak precedents and excuses. But there are no loopholes in section 43 of the State Constitution:

> 'The present apportionment of the Commonwealth into senatorial and house districts shall continue; but a reapportionment shall be made in the year 1932 and every ten years thereafter.'

"It is possible, of course, that the legislators may reassemble and put through a phony apportionment. But aside from considerations of decency, such an action would be politically very short-sighted. It would alienate the large and growing areas from candidates for Statewide offices who are affiliated with the dominant majority in the Legislature."

"1. Tending to excite odium, ill will, or envy; likely to give offense, esp. unjustly and irritatingly discriminating; as invidious distinctions."

In this particular case the backyard of some of the citizens of Norfolk are adjacent to the backyards of some of the citizens of Chesapeake and Virginia Beach. For a resident of Norfolk to know that the people of Chesapeake have twice or One Hundred (100%) Per Cent more weight per capita in the state Senate than he does, cannot help but excite ill will and envy. It is certainly unjustifiably and irritatingly discriminating.

### 2. Virginia Has Historically Considered Its Total Population In Reapportioning Representation, Including Military Related Inhabitants

Other than the vain effort to justify the invidious discrimination that the Lower Court found existing by comparing such discrimination to that existing in other states, the remaining suggestion of appellants is that the Legislature could have eliminated persons employed in the military service of the nation and their families in considering what constituted the population of the various political sub-divisions of Virginia for the purpose of reapportionment. The elimination of these citizens cannot be supported by fact or principle.

The fact the military has been an integral part of the State of Virginia and particularly the City of Norfolk since pre-Revolutionary days is a good reason why the State Constitution *does not exclude* this portion of the population from the apportionment census as do the constitutions of Alabama, Washington and Wisconsin.

The military has been an essential part of Norfolk's citizenry since Lord Dunmore fired the City on January 1, 1776.

Appellants thought so little of this point in presenting their case below that they failed to devote a single line in any of their briefs to the contention. The only evidence consisted of census statistics showing the number of citizens employed in the military service at the time of the taking of the 1960 census (R. 320)

Historically, Virginia, in considering population as a basis for reapportionment, has taken the total census figure of all areas of the state. This means that college students residing in Richmond, Charlottesville and Williamsburg have been allocated as citizens to be represented in those particular areas; prisoners and inmates of mental institutions have been allocated as residents of the particular institution to which they were confined on the day of enumeration. (R.315)

As heretofore noted, Thomas Jefferson in 1816 stated: "Let every man who fights or pays exercise his just and equal right in their election. * * *"

Every ten years an official State Commission on Reapportionment has reported to the Governor. In 1940 a report was filed as House Document No. 6 and recommended that reapportionment be abated until the 1940 census of the United States could be

received.* In 1941 the Reapportionment Commission reported its recommendation in House Document 5 and used the total population figures reflected by the United States census as the population basis for reapportioning the state. Norfolk was awarded two Senators on a total population basis of 144,332 (Page 6, House Document No. 5, 1941).

As heretofore noted, a Redistricting Commission was constituted and studied the question of the 1950 decennial reapportionment and reported by House Document No. 15 in 1951. Now Governor, Albertis Harrison, was then a state Senator and his Commission used Norfolk's total census population,

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* **Report Of Commission On Redistricting,** House Document No. 6, (1940) Page 15:

"To reapportion the State at this time, it would be necessary to use the census of 1930, modified and corrected, in so far as possible, by such scanty additional information as might be adduced. The new districts might therefore, upon their creation, be ten years out of date, and any conformity which might be achieved with the 1940 population would be largely coincidental.

"To follow such a course at this time, without waiting for the 1940 census of the United States to show the actual present population, does not seem wise to this Commission. Nor did it appear wise to the majority of those who appeared before the Commission during the course of its public hearing in Richmond on November 17, 1938. Only one delegation, all representing the same general locality, expressed at that hearing a contrary opinion.

"In view of the situation reviewed above, the Commission recommends that no legislation be enacted at the 1940 session of the General Assembly reapportioning the State into Senatorial and House districts and that such reapportionment be deferred until the session of 1942, when the United States census figures for 1940 will be available. In order to assist the General Assembly at that time, and in order to collect and present facts upon the basis of which it may take action, the Commission recommends that there be created by the General Assembly during the 1940 session a Commission to continue the study and to recommend to the 1942 session of the General Assembly a plan for redistricting the Senate."

including military, of 213,513 as justifying increasing representation in the House of Delegates from six to seven Delegates.[10]

In addition, the *Register of the General Assembly of Virginia (1940-1960)*, an official state publication uses the total population of the federal census in referring to the population of the respective political sub-divisions of the state.

In 1961 the Hoover Commission on Redistricting followed the previous policy of the state and included total population as documented by the United States census in recommending that Norfolk's representation in the Senate be increased to three and in the House of Delegates to seven.

The only witness to testify concerning the criteria employed by the Hoover Commission in arriving at a reapportionment plan was Dr. Ralph Eisenberg, and appellants did not question his use of total population figures.

Appellants on page 27 of their brief, allude to a record in a state court case brought subsequent to the instant case by different litigants to enjoin the holding of a Democratic Primary or General Election in November 1963. Appellants state the plaintiffs introduced the same evidence that is now before this Court, which is an inaccurate statement. Plaintiffs in the state court action produced a member of the Hoover Commission, who, likewise, was a member of the General Assembly, who testified that neither the Commission nor the Assembly gave any thought to eliminating military related citizens from the population basis to be used for reapportionment. Appellants suggest that in this unrelated state court case exhibits showed a rational and practical jus-

[10] See Recommendation 56, Page 8, House Document No. 15, 1951

tification for the exclusion of military population. This is not a correct statement of a record not before this Court.

Aside from the fact that the policy in Virginia has been not to exclude military related persons from reapportionment considerations, appellants must concede that there is no way it could be done with uniformity and consistency. The only evidence to which they point is table 115 of defendant's exhibit 11, which is improperly set up on Record 318. Record 318 states the statistics as to persons employed by the military are available for cities and counties of 25,000 or more, where in fact table 115 provides such statistics only for areas of 250,000 or more and one can only guess as to how many of these individuals are married or have children.

Appellants will concede that no effort was made in any reapportionment analysis to exclude military related population from Prince George County where 13,608 of a total population of 20,000 were military related. It will be further conceded that there is no appreciable difference between the proportion of military population in the adjacent City of Virginia Beach, formerly Princess Anne County, and that of Norfolk, and yet the apportionment which appellants seek to defend granted the City of Virginia Beach an additional Delegate based upon the increased population, including military related citizens.

The Virginia Constitution contains numerous references to the policy of the state to include total inhabitants in governmental functions.[11]

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[11] Art. 3 "a majority of the community" has "right to reform, alter, or abolish "any government".

Art. 55 Congressional districts shall contain "as nearly as practicable an equal number of inhabitants."

The Court below was correct in holding that the evidence relating to the exclusion of military related citizens was neither explicit nor satisfactory.

### C. Suggested Rule For Testing A Violation Of The Fourteenth Amendment In State Legislative Apportionment Cases

This case and others similar thereto, which will be heard by this Court, offer an opportunity to establish a guideline for lower courts to determine when a state legislative apportionment plan violates the Fourteenth Amendment.

It is submitted that a republican form of government requires that it be as representative as possible. Although *Gray v. Sanders,* (1963) 372 U.S. 368, 83 S. Ct. 801, does not attempt to establish the

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(Footnote 11 Continued)

**Art. 95** "* * * But no new circuit court shall be created containing by the last United States census or other census provided by law less than 40,000 inhabitants, nor when the effect of creating it will be to reduce the number of inhabitants in any existing circuit below 40,000 according to such census.

**Art. 98** For the purpose of judicial systems, cities of the state are divided into 2 classes. "Cities having a population of 10,000 or more as shown by the last United States census or other census provided by law, shall be cities of the first class, etc."

**Art. 116** Definition of "cities and towns". "* * * All incorporated communities, having within defined boundaries, a population of 5,000 or more, shall be known as cities * * *. In determining the population of such cities and towns the General Assembly shall be governed by the last United States census or such other enumeration as may be made by authority of the General Assembly; * * *"

**Art. 121** Where city has wards, representation shall be allocated in proportion to the population of such ward. Reapportion representation every 10 years.

**Art. 135.** In apportioning state school funds, Constitution provides that such funds shall be apportioned on the basis of total school population of children between the ages of 7 and 20.

ground rules for state legislative reapportionment suits, it is submitted that it does direct attention to the road this Court will travel. On page 808 of 83 S. Ct., the Court raises this question, and then answers it:

> "* * * How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatexer their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his state, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.
>
> "* * *
>
> "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth and Nineteenth Amendments can mean only one thing — one person, one vote."

An extension of this holding to the State of Virginia was done at the Constitutional Convention of 1829-30 by Delegate Taylor of the Borough of Norfolk. Mr. Taylor was quoted as follows:

> "The fourth resolution is nothing more than a corollary to the second. It is only the expansion and application of the same principle to representation, which is proposed to the

voters themselves, i.e., that *representation* shall be *uniform*, that *like numbers shall confer like rights of representation, without regard to the disparity of fortune which may exist in the aggregate.*" (Italics Supplied)

The principle adopted by this Court in *Gray v. Sanders*, (1963) 372 U. S. 368, 83 S. Ct. 801, was applied to state legislative elections in *Giddings v. Blacker, Secretary of State*, (Mich. 1892) 52 N.W. 944. The Michigan Supreme Court held at page 946:

"* * * It was never contemplated that one elector should possess two or three times more influence, in the person of a representative or senator, than another elector in a district. Each, in so far as it is practicable, is, under the constitution, possessed of equal power and influence. Equality in such matters lies at the basis of our free government. It is guaranteed, not only by the constitution, but by the ordinance of 1787, organizing the territory out of which the State of Michigan was carved. State v. Cunningham, supra."

In the instant case, appellants submitted no rational plan for justifying admitted disparities in representation influence of more than two for one.

It is respectfully submitted that the rule of *Gray v. Sanders*, (1963) 372 U.S. 368, 83 S. Ct. 801, is equally applicable to state legislative apportionment and that a republican form of government requires that state representation shall be uniform and like numbers shall confer like rights of representation. Wherever state legislative apportionment deviates from this controlling principle, invidious discrimination in contravention of the Equal Protection Of The Laws granted by the Fourteenth Amendment will have been established.

## V. CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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## PROOF OF SERVICE

I, Henry E. Howell, Jr., one of counsel for the intervening appellees herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 26th day of September, 1963, I served copies of the within Brief On Behalf Of Intervening Appellees on the several appellants herein by mailing same in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record as follows: Robert Y. Button, Esquire, Attorney General of Virginia, Supreme Court-State Library Building, Richmond 19, Virginia; R. D. McIlwaine, III, Esquire, Assistant Attorney General, Supreme Court-State Library Building, Richmond 19, Virginia; David J. Mays, Esquire of Tucker, Mays, Moore & Reed, State-Planters Bank Building, Richmond 19, Virginia; and Henry T. Wickham, Esquire, of Tucker, Mays, Moore and Reed, State-Planters Bank Building, Richmond 19, Virginia, and on Edmund D. Campbell, Esquire, Southern Building, Washington, D. C. and E. A. Prichard, Esquire, 106 N. Payne Street, Fairfax, Virginia, counsel for appellees.

Henry E. Howell, Jr.